

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

77-4419

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

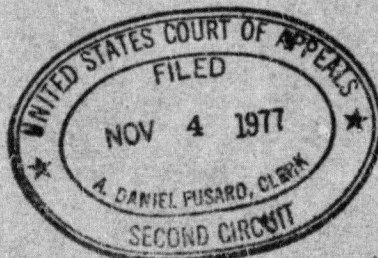
v.

DISTRICT 1199, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES,
RWDSU, AFL-CIO,

Respondent.

On Application For Denial Of Enforcement
Of An Order Of The National Labor Relations
Board

BRIEF FOR RESPONDENT, DISTRICT 1199,
NATIONAL UNION OF HOSPITAL AND HEALTH
CARE EMPLOYEES, RWDSU, AFL-CIO



SIPSER, WEINSTOCK, HARPER,
DORN & LEIBOWITZ
Attorneys for Respondent
380 Madison Avenue
New York, New York 10017

Of Counsel:

HARRY WEINSTOCK
VICKI ERENSTEIN

TABLE OF CONTENTS

	<u>Page</u>
Counter Statement of the Issues Presented	1
Counter Statement of the Case	2
 <u>Point I:</u>	
THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD SHOULD NOT BE ENFORCED BECAUSE IT IS BASED UPON A PROCEEDING WHERE THE UNION WAS DENIED THE OPPORTUNITY TO PRESENT ITS COMPLETE DEFENSE TO THE BOARD'S UNFAIR LABOR PRACTICE CHARGES. A REMEDIAL ORDER BASED UPON SUCH AN INCOMPLETE RECORD IS VIOLATIVE OF DUE PROCESS.	10
A. The Denial Of The Continuance Imposed Upon The Union's Agents And Members An Unconstitutional Choice Between Their Privileges Against Self-Incrimination And Their Right To Present A Defense To The Unfair Labor Practice Charges	10
B. The Legislative History Of The Immunity Provisions Of The Organized Crime Control Act Of 1970, 18 U.S. C. §6001 <u>et seq.</u> Makes Clear That The Board Erroneously Construed Section 102.31 Of Its Rules And Regulations As Affording The Union A Means To Obtain Immunity For Its Own Agents And Other Friendly Witnesses	15
C. Assuming Arguendo That The Board Properly Construed Section 102.31(c), It Should Have Remanded The Case To The	

Administrative Law Judge To Afford District 1199 An Opportunity To Apply For An Immunity Order For Its Principal Witnesses, Rather Than Issuing An Order Based Upon The Incomplete Record. The Court Should Deny Enforce- ment Of The Order Because It Is Based Upon A Proceeding Which Violated Due Process	30
--	----

Point II:

NO SUBSTANTIAL EVIDENCE HAS BEEN PRESENTED WHICH SUPPORTS THE CON- CLUSION OF THE BOARD THAT A DISTRICT 1199 AGENT MADE A THREAT UPON THE LIFE OF AN EMPLOYEE	37
---	----

A. The First Amendment Protects Freedom Of Speech On A Picket Line. The Court Should Deny Enforcement Of That Portion Of The Board's Order Which Penalizes The Union For The Exercise Of Free Speech	37
--	----

B. No Substantial Evidence Was Presented That A Threat To Kill Was Made	40
---	----

C. The Court Should Deny Enforcement Of That Portion Of The Board's Order Which Directs District 1199 To Cease And Desist From "Threatening To Kill Employees" Inasmuch As This Sanction Is Punitive And Constitutes A Depar- ture From Board Precedent	44
---	----

Conclusion	46
----------------------	----

AUTHORITIES CITED

<u>Cases:</u>	<u>Page</u>
Bethlehem Steel Co. v. NLRB 120 F.2d 641 (App. D.C. 1941)	33, 35
Brown v. Walker 161 U.S. 591 (1896)	19
Church Point Wholesale Grocery 215 NLRB No. 93	40, 41, 42
Consolidated Edison Co. v. NLRB 305 U.S. 197 (1938)	44
Courter & Company, Inc. 198 NLRB No. 29	42
Donnelly Garment Company v. NLRB 123 F.2d 215, 224 (8 Cir. 1941)	11-12, 32, 33, 34, 36
Gardner v. Broderick 392 U.S. 273 (1968)	13, 14
Garrity v. State of New Jersey 385 U.S. 493 (1967)	13
Griffin v. State of California 380 U.S. 609 (1965)	12, 13, 14
Hagopian & Sons, Inc. v. NLRB 395 F.2d 947 (6th Cir. 1968)	34, 36
Hale v. Henkel 201 U.S. 43 (1906)	19
Ideal Electric and Manufacturing Co. 134 NLRB 1275	31
Indianapolis Glove Company 88 NLRB 986	36
International Association of Machinists (General Electric Co.) 183 NLRB No. 126	45

<u>Cases:</u>	<u>Page</u>
International Brotherhood of Pottery and Allied Workers (Homer Laughlin China, Inc.) 317 NLRB No. 19	45
Kastigar v. U. S. 406 U.S. 441, (1972).	11, 18, 23
Lefkowitz v. Turley 414 U.S. 70 (1973)	13, 14
Lilliston Implement Company 171 NLRB No. 19	31
Linn v. United Plant Guard Workers 383 U.S. 53 (1966).	38
Local No. 3887, United Steelworkers of America (Stephenson Brick & Tile Company) 129 NLRB No. 4	45
Malloy v. Hogan 387 U.S. 1, 8 (1964).	12
Milk Wagon Drivers Union v. Meadowmoor Dairies 312 U.S. 287 (1941)	37, 38
McCarthy v. Arndstein 266 U.S. 34, 40 (1924).	11
Murphy v. Waterfront Commission 378 U.S. 52 (1964).	11
NLRB v. Baldwin Locomotive Works 128 F.2d 39 (3 Cir. 1942)	33
NLRB v. Beech-Nut Life Savers, Inc. 406 F.2d 253 (2 Cir. 1968).	31
NLRB v. Bryan Mfg. Co. 196 F.2d 477 (7 Cir. 1952).	33
NLRB v. Ebner Bros. Packers 364 F.2d 565 (5 Cir. 1966).	34
NLRB v. M. Koppel Company 412 F.2d 681 (3 Cir. 1969).	33, 34, 36

<u>Cases:</u>	<u>Page</u>
NLRB v. Metropolitan Life Insurance Company 380 U. S. 438 (1965)	46
NLRB v. V. I. Posner 342 F.2d 826 (2 Cir. 1962)	34
NLRB v. Selwyn Shoe Manufacturing Corporation 428 F. 2d 217 (8th Cir. 1970).	34, 35, 36
Old Dominion Branch No. 496 v. Austin 418 U.S. 264 (1974)	38, 39
Oneonta Dress Co. v. NLRB 333 F.2d 1 (2nd Cir. 1964)	34, 36
Perma Vinyl Corp. 164 NLRB 96	31
Rockwell Manufacturing Co. v. NLRB 330 F.2d 795 (7th Cir. 1964)	31
San-Tul Hotel 192 NLRB No. 173	34
Spevack v. Klein 385 U.S. 511 (1967).	12, 13
Stafford Trucking Inc. 166 NLRB No. 107	40, 41, 42
Standard Oil Co. of California 62 NLRB 449	36
Teamsters and Chauffeurs Local Union No. 729, etc. (Penn Truck Co. Inc.) 189 NLRB No. 4	45
Thornhill v. Alabama 310 U.S. 88 (1939)	37, 39
Uniformed Sanitation Men Association Inc. v. Sanitation Commissioner 392 U.S. 280 (1968)	13, 14

<u>Cases</u>	<u>Page</u>
U. S. v. Armour & Co. 142 Fed. 808 (N.D. Ill. 1906)	19
U. S. v. Compton 428 F.2d 18 (2nd Cir. 1970)	43
U. S. v. Dunham Concrete Products, Inc. 475 F.2d 1141 (5 Cir. 1973).	26
U. S. v. Hinton 543 F.2d 1002 (2nd Cir. 1976).	24
U. S. v. Monia 317 U.S. 424 (19)	20
U. S. v. Seiffert 501 F.2d 974 (5th Cir. 1974).	27
U. S. v. Wilmington Chemical Corp. 254 F. Supp. 92 (ND Ill. 1966).	27
United Steelworkers of America (Vulcan-Cincinnati) 137 NLRB No. 19	45
H. Wagner & Adler & Co. v. Mali 74 F.2d 66 (2nd Cir. 1935).	26
Watts v. U. S. 394 U.S. 705 (1969)	42-43
T. C. Worthy Wholesale, Inc. 159 NLRB No. 137.	42
Yankee Trades, Inc., d/b/a Treadway Inn at Rochester, N. Y.	42
 <u>Statutes:</u>	
Act of June 30, 1906, 15 U.S. C. §33	20
Administrative Procedure Act 5 U.S. C. §556(d)	11

<u>Statutes:</u>	<u>Page</u>
National Labor Relations Act	
Section 8(b) (1) (A) 29 U.S.C. §158(b)	
(1) (A)	3,7
Organized Crime Control Act of 1970	
18 U.S.C. §6001 <u>et seq.</u>	2,14,15-17, 18,21,22,23, 28, 30
Securities Act of 1933	20
15 U.S. §77 V(c)	
United States Constitution	
First Amendment	37,38
Fifth Amendment	10,11,12, 13, 14, 23, 30
 <u>Administrative Rules</u>	
Rules and Regulations, National Labor Relations Board, Series 8	
Section 102.31.	2,15,17,18,24, 30,31
Section 102.35	33
Section 102.38	10
 <u>Miscellaneous</u>	
Comment, "The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitu- tional Tightrope," 72 Yale L.J. 1568 (1963)	19
Hearings on Federal Immunity of Witness Act, H.R. 11157 and H.R. 12041, Subcommittee, No. 3 of the Committee on the Judiciary, 91 Cong. 1st Sess. (1969)	22,23
H.R. Rep. 91-1188, 91st Cong., 2nd Session (1920)	21
S. Report No. 91-617, 91st Cong., 2nd Session, 201 (1970).	23
Working Papers of the National Commission on the Reform of Federal Criminal Laws, Vol. II (1970)	19,21

NO. 77-4119

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DISTRICT 1199, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES,
RWDSU, AFL-CIO,

Respondent.

On Application For Denial Of Enforcement
Of An Order Of The National Labor Relations
Board

BRIEF FOR RESPONDENT, DISTRICT 1199,
NATIONAL UNION OF HOSPITAL AND HEALTH
CARE EMPLOYEES, RWDSU, AFL-CIO

COUNTER STATEMENT OF THE ISSUES PRESENTED

1. Whether the order of the National Labor Relations Board (hereinafter "Board") based upon a proceeding in which District 1199, National Union of Hospital and Health Care

Employees, RWDSU, AFL-CIO, (hereinafter "District 1199" or "Union") was denied an opportunity to present its complete defense to the unfair labor practice charges, violates the requirements of due process?

2. Whether the denial of the request for a continuance imposed upon District 1199's agents and members an unconstitutional choice between their privileges against self-incrimination and their right to present a defense in the unfair labor practice proceeding?

3. Whether the Board's construction of Section 102.31 of its Rules and Regulations as affording the Union a means to obtain immunity for its own agents and friendly witnesses contravenes the intent of Congress in enacting the immunity provisions of the Organized Crime Control Act of 1970, 18, U.S.C. §6001 et seq.?

4. Whether substantial evidence has been presented that a District 1199 agent made a threat upon the life of an employee?

COUNTER STATEMENT OF THE CASE

Introduction

The order sought to be enforced by the Board was issued in an administrative proceeding in which District 1199 was denied the opportunity to present in its defense the testimony

of certain of its agents and members who were alleged to have engaged in conduct violative of Section 8(b)(1)(A) of the National Labor Relations Act, but who were unavailable to testify at the unfair labor practice hearing because of pending state criminal prosecutions arising out of the same events. As will be discussed below, it is the position of District 1199 that the requirements of due process do not permit the enforcement of an administrative order based upon such an incomplete record. As will also be discussed below, in the alternative, the Court is asked to deny enforcement of a portion of the Board's order that is based upon a finding not supported by substantial evidence.

Proceedings Before The Administrative Law Judge

On May 12, 13, and 14, 1976, a hearing was held before Administrative Law Judge Peter Donnelly upon the General counsel's complaint alleging that District 1199 had violated Section 8(b)(1)(A) of the Act in connection with picket line activity during its strike at Southport Manor Nursing Home, which was in its sixth month. The General Counsel presented testimony concerning several incidents of: pounding upon and throwing beverages at the closed windows of cars crossing the picket line, shouting, and stepping on the heels of a non-striking employee. The testimony also indicated that District 1199 organizer Kevin Doyle was often present at the picket line.

Although there was no evidence of actual or attempted acts of violence, property damage or injury to persons by District 1199 agents or members during the protracted strike, Loren Sherman, a non-striking employee and the son of Southport's Assistant Administrator did testify that Kevin Doyle had once uttered the words "Sherman, I'm going to kill you" as Sherman drove through the picket line. [A.141]* However, upon cross-examination, Sherman conceded that he frequently shouted obscenities and made vulgar gestures and traded vile insults as he crossed the picket line, and he further conceded that he had directed crude and obscene epithets at Kevin Doyle. [A.184-186].

The Union's Request For A Continuance

At the close of the General Counsel's case, counsel for the Union informed the Court that certain union agents and members whose testimony was necessary to the Union's defense were at present unavailable because they were facing state criminal prosecutions arising out of the same acts and occurrences adverted to by the General Counsel's witnesses. She told the Court that the criminal defense attorney for these individuals had informed her that they would not give testimony

*"A" refers to the printed appendix.

in the Board proceeding prior to their criminal trials, which were scheduled for later that month [May] and early June. Counsel then requested a continuance of the unfair labor practice hearing pending the criminal trials, and argument ensued.

At the outset, the Union's attorney stated:

(Ms.) Erenstein ". . . in situations where the Board is contemplating calling a witness . . . I know from reading the rules that where it's contemplated that a person might invoke a fifth amendment privilege . . . There's provisions to make special application under certain circumstances to be able to call such a person." [A. 216-217].

In contrast to the Board's option, Union counsel presented the court with the Union's dilemma:

Ms. Erenstein: "Now I'm in the position of a Respondent. I do need these witnesses, I feel, to defend my case; on the other hand, I feel it would jeopardize them unduly at this time to go ahead." [A. 217]

Counsel for the General Counsel initially opposed the request for the continuance on the grounds of delay, referring to the large number of strike cases as well as the possibility of postponements and appeals in these cases. The judge expressed similar concerns. However, District 1199's attorney pointed out that she was seeking the testimony of a limited number of individuals, and offered to arrange through their

criminal attorney to schedule their cases first in order to obtain prompt dispositions [A. 220-221]. In addition, she informed the Court that she was only seeking a continuance pending their trials, and not to extend during possible appeals. [A. 218].

Throughout the argument, Union counsel stressed the possibility that testimony given by the Union witnesses in the Board proceeding might be used against them in the criminal prosecutions. Apparently, neither counsel for the General Counsel nor the Administrative Law Judge believed that the Fifth Amendment's prohibition against compulsory self-incrimination had any application in an unfair labor practice hearing:

Mr. Biblowitz: [Counsel for General Counsel] . . . I'm not familiar with the legal issues involved, but I don't believe it has any relevance to these individuals testifying here. These individuals will be testifying as to these incidents that occurred, and they'll be sworn to tell the truth and obviously I assume they will tell the truth; and therefore I don't see how they can be incriminated. [A. 222]

Similarly, the Administrative Law Judge emphasized that the National Labor Relations Board proceeding was a civil matter and not a criminal case [A. 218,222], and he queried:

Judge Donnelly: In other words, you're concerned about . . . the possibility that the Judge in the criminal case will say, 'On

the basis of what he has testified to at the National Labor Relations Board proceeding, I'm making a finding of . . .!"? [A. 223].

The Administrative Law Judge then denied the motion for a continuance. [A. 223] As a result of his ruling, District 1199 could only present a "defense" consisting of the brief testimony of three witnesses who were not directly involved in the incidents referred to by the General Counsel's witnesses. Thereafter, counsel renewed the request for a continuance and advised the Court that the Union could not present a complete defense without the testimony of Kevin Doyle, Marilee Milstein, Myrtle Nicholson, and Mary Fanueff, [A. 369] as to whom General Counsel's witnesses had attributed certain remarks and actions, and who were unavailable to testify because of pending criminal prosecutions. The motion was again denied and the hearing was closed.

The Administrative Law Judge's Decision

The Administrative Law Judge noted, in resolving credibility conflicts in favor of General Counsel's witnesses, that District 1199 had failed to present witnesses who were directly involved in the specific 8(b)(1)(A) allegations and he emphasized the fact that Organizer Kevin Doyle had not testified [A. 2-3]. He also commented upon the failure of Kevin Doyle to testify and drew a negative inference therefrom in

connection with an incident involving Marie Hill and Barbara Crimley, upon which the judge based a finding of unlawful union conduct. [A. 4].

The Administrative Law Judge made findings that the Union had violated the Act by the picket line conduct of its agents and members to which General Counsel's witnesses had testified, e.g., pounding windows, stepping on heels, shouting "you'll get yours", and he made the further finding that Kevin Doyle's naked utterance, "I'm going to kill you Sherman," constituted a "threat upon Sherman's life" and was "clearly coercive, even assuming that Kevin Doyle and Sherman had exchanged profanities as Sherman came and went through the picket line". [A. 5]. In his proposed order, the Administrative Law Judge ordered inter alia that the Union cease and desist from "threatening to kill employees". [A. 8].

The Decision of the Board

The Union urged before the Board, inter alia, that the Administrative Law Judge's denial of the continuance prevented it from presenting its defense to the unfair labor practice charges. It further argued that this ruling imposed upon its agents and members an unconstitutional choice between their privileges against self incrimination and their right to present a defense in the Board proceeding.

The Board affirmed the Administrative Law Judge's findings and conclusions and adopted his proposed order with one modification. In affirming the denial of the continuance, the Board purported to justify this ruling upon grounds which were neither considered by the Administrative Law Judge nor urged by the General Counsel before the judge or the Board. The Board held, sua sponte, that the Union had not been denied an opportunity to present its defense because it could have invoked the procedure set forth in Section 102.31 of the Board's Rules and Regulations and Statement of Procedure to compel the testimony of its own agents and members. [A. 19]. The Board also held that: "witnesses called by Respondent would not be required to waive their privilege against self-incrimination since any witness asserting such a right will not be forced to testify, absent a grant of immunity, 18 U.S.C. §6001, et seq." [A.19].

ARGUMENT

I

THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD SHOULD NOT BE ENFORCED BECAUSE IT IS BASED UPON A PROCEEDING WHERE THE UNION WAS DENIED THE OPPORTUNITY TO PRESENT ITS COMPLETE DEFENSE TO THE BOARD'S UNFAIR LABOR PRACTICE CHARGES. A REMEDIAL ORDER BASED UPON SUCH AN INCOMPLETE RECORD IS VIOLATIVE OF DUE PROCESS.

- A. The Denial Of The Continuance Imposed Upon The Union's Agents And Members An Unconstitutional Choice Between Their Privileges Against Self-Incrimination And Their Right To Present A Defense To The Unfair Labor Practice Charges

District 1199 sought a continuance because its principal defense witnesses, certain union agents and members, were unavailable to testify because of their assertion of their rights under the Fifth Amendment to the United States Constitution. The request for a continuance was denied after doubts were expressed by counsel for the General Counsel and the Administrative Law Judge as to the "relevance" of the privilege against self-incrimination in an unfair labor practice proceeding. Notwithstanding such doubts, it is an elementary principle of constitutional law that the Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicary," and that "it protects against any disclosures

which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. "Kastigar v. U.S., 406 U.S. 441, 445-446 (1972). See also Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

It is likewise elementary that the due process right to a fair hearing, also guaranteed by the Fifth Amendment, includes the right of a party to answer and present testimony in defense to the charges made against it. Congress has guaranteed this right to parties in federal administrative proceedings by providing in the Administrative Procedure Act, 80 Stat. 386, 5 U.S.C. §556(d) that:

. . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination as may be required for a full and true disclosure of the facts."

This guarantee is reiterated in the Rules and Regulations of the National Labor Relations Board, Section 102.38, 29 C.F.R. Section 102.38.

The Courts have consistently denied enforcement of Board orders which were violative of due process because the Administrative Law Judge has restricted the respondent in the presentation of its defense. See e.g. Donnelly Garment Company

v. NLRB, 123 F2d 215 (8 Cir. 1941). (See full discussion, Sub-point "C" below). It is undisputed that District 1199 required the testimony of its agents and members asserting their Fifth Amendment privilege in order to rebut the testimony of the General Counsel's witnesses attributing unlawful picket line activities to them. It is also undisputed that the Union had been advised that these witnesses would not be available to testify in the Board proceeding during the pendency of their state criminal trials. In denying a continuance under these circumstances, the Administrative Law Judge rendered a nullity of the right to present a defense to the unfair labor practice charges.

Likewise, the denial of the continuance nullified the privilege against self-incrimination. The Fifth Amendment guarantees against federal infringement "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Malloy v. Hogan, 378 U.S. 1, 8, (1964). This constitutional protection prohibits "the imposition of any sanction which makes assertion of the Fifth Amendment "costly". Spevack v. Klein, 385 U.S. 511, 515 (1967) citing Griffin v. State of California, 380 U.S. 609, 615, (1965).

In numerous cases, the Supreme Court has acted to invalidate sanctions which were threatened or imposed as a

result of the exercise of the privilege against self-incrimination. In Griffin v. California, 380 U.S. 609 (1954) the Court held that a pro ecutor's comment upon the failure of a criminal defendant to testify in his own defense was violative of the Fifth Amendment. In Spevack v. Klein, 389 U.S. 511, (1967) the Court held that an attorney could not be disbarred on the basis of his assertion of the privilege in a disciplinary proceeding. In Gardner v. Broderick, 392 U.S. 273, (1968), the court overturned the dismissal from employment of police officers because of their refusal to waive their privileges against self-incrimination, and invalidated the statute which required dismissals under those circumstances. See also Uniformed Sanitation Men Association Inc., v. Sanitation Commissioner, 392 U.S. 280, (1968); Lefkowitz v. Turley, 414 U.S. 70, (1973).

In Garrity v. State of New Jersey, 385 U.S. 493, 498 87 S. Ct. 616, 619 (1967), the Court characterized the dilemma which confronted police officers who gave statements in an administrative proceeding at the pain of removal from office for failure to testify as a choice "between the rock and whirlpool," and reversed the convictions obtained with the aid of such statements as violative of the Fifth Amendment.

Similarly, in the present case, District 1199 was faced with an unconstitutional choice "between the rock and

whirlpool." As an unincorporated association, the Union exists and acts as a legal entity through its agents and members. The denial of a continuance forced these agents and members to choose between two protected rights: they could withhold their testimony, as is their right under the Fifth Amendment, and thereby forego their right to present a defense in the Board trial; or they could testify in defense to the unfair labor practice charges at the price of their possible self-incrimination.

The Administrative Law Judge's ruling exacted a waiver of the right to defend against the unfair labor practice charges as the price for the exercise of the privilege against self-incrimination. As a result of the "choice" made in favor of the Fifth Amendment rights, District 1199 has been penalized. The Administrative Law Judge's drawing of negative inferences from the failure of the Union witnesses, and in particular organizer Kevin Doyle, to testify, violates the Fifth Amendment. Griffin v. California, supra . Moreover, an unlawful sanction has been imposed. A remedial order has been issued against the Union as the cost for the assertion of the privilege. This order is unconstitutional and should not be enforced by this Court. Griffin v. California, Spevack v. Klein; Gardner v. Broderick; Uniformed Sanitation Men; Lefkowitz v. Turley, supra.

B. The Legislative History Of The
Immunity Provisions Of The
Organized Crime Control Act
Of 1970, 18 U.S.C. §6001 et seq.
Makes Clear That The Board
Erroneously Construed Section
102.31 Of Its Rules And
Regulations As Affording The
Union A Means To Obtain
Immunity For Its Own Agents
And Other Friendly Witnesses.

The Board does not disagree with District 1199's contention that the imposition of a choice between the exercise of the privilege against self-incrimination and the right to present a defense to the unfair labor practice charges is unconstitutional. Rather it contends that Section 102.31 of the Board's Rules and Regulations affords to the Union a procedure which would avoid such an unconstitutional choice by enabling it to compel the testimony of its agents and members in exchange for grants of immunity pursuant to the Organized Crime Control Act of 1970, 18 U.S.C. Section 6001 et seq. The Organized Crime Control Act of 1970 provides, in relevant part:

Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to -

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a

committee or a subcommittee of either House, and the person presiding over the proceedings communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. 18 U.S.C. Section 6002.

* * *

Certain administrative proceedings

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Section 6002 of this part.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment:

- (1) the testimony or other information from such individual may be necessary to the public interest; and
- (2) Such individual has refused or

is likely to refuse to testify or provide information on the basis of his privilege against self-incrimination. 18 U.S.C. Section 6004.

Section 102.31(c) of the Rules and Regulations of the National Labor Relations Board, Series 8, enacted in December 1970 to implement the new immunity statute in proceedings arising under the National Labor Relations Act, provides in relevant part:

(c) With the approval of the Attorney General of the United States, the Board may issue an order requiring any individual to give testimony or provide other information at any proceeding before the Board if, in the judgment of the Board, (1) the testimony or other information from such individual may be necessary to the public interest, and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self incrimination. Requests for the issuance of such an order by the Board may be made by any party. Prior to hearing, and after transfer of the proceeding to the Board, such requests shall be made to the Board in Washington, D. C., and the Board shall take such action thereon as it deems appropriate. During the hearing, and thereafter while the proceeding is pending before the administrative law judge, such requests shall be made to the administrative law judge. . . . If the administrative law judge deems the request appropriate, he shall recommend that the Board seek the approval of the Attorney General for the issuance of the order, and the Board shall take such action on the administrative law judge's recommendation as it deems appropriate. Until the Board has issued the requested order no individual who claims the privilege against self-incrimination shall be required, or permitted, to testify or to give other information respecting the subject matter of the claim.

The question presented in this case of whether a grant of immunity is available under the Organized Crime Control Act where the interrogator seeking to "compel" the testimony is the private counsel of the witness or the witness's principal, is a case of first impressions. There are no reported decisions under the immunity statute or Section 102.31 which discuss this issue. However, the legislative history of the statute indicates that Congress did not intend to make available to a private party such as District 1199 the means to immunize the testimony of its own friendly witnesses. As will be discussed below, the Board's construction of Section 102.31 would open the door to the very abuses which the immunity statute was designed to eliminate.

Historical Background Of Federal Immunity Legislation

Historically, federal immunity statutes have served as important law enforcement tools. In Kastigar v. U.S., 406 U.S. 443, 445-447 the Supreme Court noted:

Immunity statutes, which have historical roots deep in Anglo-American jurisprudence . . . seek a rational accommodation between the imperatives of the privilege [against self-incrimination] and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed,

their origins were in the context of such offenses, and their primary use has been to investigate such offenses.

See also Brown v. Walker, 161 U.S. 591, 610. (1896); Hale v. Henkel, 201 U.S. 43, 70. (1906).

However, a recurring theme in the history of the immunity statutes has been their utilization by potential or actual criminal defendants as a means to frustrate criminal prosecutions. In response to such abuse of the immunity laws, Congress has acted on several occasions to limit the circumstances under which immunity may be obtained or to narrow the scope of immunity available to witnesses in federal proceedings. See generally, Working Papers of the National Commission on Reform of Federal Criminal Laws Vol II, 1405 - 1448, (U.S. Government Printing Office 1970); Comment, "The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope," 72 Yale L. J. 1568 (1963).

This theme was clearly illustrated in the case of United States v. Armour & Co., 142 Fed. 808 [N.D. Ill. 1906], involving a criminal prosecution of Armour corporate officials under the Sherman Act. Sometime prior to their indictment, the defendants had held informal and voluntary conversations with the U. S. Commissioner of Corporations in connection with his investigation of the price of cattle. Congress had conferred upon the Commissioner's investigation the immunity

protection contained in the Interstate Commerce Act, which provided that "no person shall be prosecuted . . . on account of any transaction . . . concerning which he may testify before such commission" The officers had urged before the district court that they were immune from prosecution under this statute.

The Court held that the officers' informal conversations with the Commissioner operated to confer immunity despite the fact that the witnesses had neither been subpoenaed or placed under oath, and it dismissed their indictments. Discussing this case in United States v. Monia, 317 U.S. 424, 428-429, the Supreme Court observed that "[t]he decision attracted public interest since, if it stood, one could immunize himself from prosecution by volunteering information to investigatory bodies."

In reaction to this decision, Congress enacted the Act of June 30, 1906, 15 U.S.C. §33, which limited the grant of immunity in federal proceedings to natural persons who testified or produced evidence (1) in response to a subpoena, and (2) under oath. United States v. Monia, 317 U.S. at 429.

Congress further restricted the availability of immunity in the enactment of the Securities Act of 1933, 15 U.S.C. §77V (c), which imposed the additional requirement that immunity would be available only if the witness first

claimed his constitutional privilege against self-incrimination and was compelled to testify. This limitation was included in the immunity provisions of most of the subsequent federal regulatory statutes, including Section 11(3) of the National Labor Relations Act.

Nevertheless, criminal defendants continued to utilize the immunity statutes to shield themselves from prosecution. See Working Papers of the National Commission on Reform of Federal Criminal Laws. See also H. R. Rep. 91-1188. 91st Cong. 2nd Sess. 7-1 (1970). Proposals were advanced for further reform, leading to the current Organized Crime Control Act of 1970.

The Current Immunity Statute

In the hearings on H. R. 11157, a companion bill to the Organized Crime Control Act, Professor Robert Dixon, Jr., consultant to the National Commission on Reform of the Federal Criminal Law summarized the weaknesses of the existing immunity statutes:

The chief characteristic, and also vice, of the many special witness immunity statutes which the proposed statute would replace, is that they load the dice in favor of the witness and leave the public interest to chance. One might almost think that they were drafted by a panel of criminal defense lawyers and without even the spirit of Robin Hood, rather than a body of elected representatives of the people. These present statutes confer

upon an immunized witness absolute immunity from future prosecution for anything related to his testimony, even if the evidence used is wholly independent of the testimony or was in government hands before the testimony was given. The technique under some of the statutes is that the witness pleads the Fifth Amendment, is offered immunity, and then testifies (unless the public interrogator chooses to withdraw the question to avoid giving immunity). But some present statutes offer even a greater bonus. They can be called the automatic immunity statutes. Under these, every witness who is sworn and testifies gets a blanket immunity regarding anything relating to his testimony, even if he never pleads the Fifth Amendment. Under this set-up which seems ideal for persons in organized crime, the public interrogator receives no warning of immunity potentialities, and has no way of limiting the immunity bath by withdrawing questions that touch upon Fifth Amendment rights.

Hearings on Federal Immunity of Witness Act, H. R. 11157 and H. R. 12041. Subcommittee, No. 3 of the Committee on the Judiciary, 91 Cong. 1st Sess. 55 (1969).

The immunity provisions of the Organized Crime control Act were enacted in order to remedy these weaknesses. The new legislation narrowed the scope of the immunity available so as to prohibit only the use of the compelled testimony or its fruits in a subsequent criminal prosecution rather than to confer a general amnesty from future prosecution for any crime even remotely relating to the immunized testimony. 18 U.S.C. §6002. The government's control over the immunity granting process was strengthened by the repeal of the 40 separate immunity statutes then in existence and their replacement by the single

statute which conferred exclusive authority upon the Attorney General to grant immunity in federal proceedings. S. Report No. 91-617 91st Cong. 2nd Sess., 201 (1970).

In addition, the new statute provided that the order of the Attorney General granting immunity could be obtained in advance. However, the immunity becomes operative only after the witness has invoked the privilege and the order has been read to him. Professor Dixon noted in the House hearings that "[t]he function of the so-called immunity order is only to empower the interrogator, if he chooses, to override a particular witness's attempt to shelter himself under the Fifth Amendment" Hearings on the Federal Immunity of Witness Act at 58.

Although the new statute limits both availability and scope of immunity for witnesses in federal proceedings, nevertheless, it provides for the protection of the Fifth Amendment rights of the immunized witness. The immunity conferred by Section 6002 prohibits the government from using the compelled testimony "in any respect" to prosecute the witness. Kastigar v. U.S., 406 U.S. at 453. In a subsequent criminal trial, the witness who had previously testified pursuant to a grant of immunity may challenge any of the government's evidence against him on the basis that it was obtained as a result of the immunized testimony. The burden is placed upon the prosecution to show that its evidence is free of taint. 406 U.S. at 460.

The government's burden is substantial:

This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

* * *

. . . One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources. (Emphasis supplied). 406 U.S. at 460-462.

See also, United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976)

The Board's expansive interpretation of the immunity statute and of Section 102.31 provides the criminal defendant with the means to hinder his own prosecution through the utilization of the procedure discussed above. This is clearly demonstrated by the circumstances of the present case, where the witnesses to be "compelled" to testify are witnesses "friendly" to the respondent. Assuming arguendo that an order granting immunity to the Union's witnesses could be obtained pursuant to Section 102.31, the primary interrogator of these witnesses would be the Union's counsel, rather than the government attorney. Once the initial order of immunity is granted, the government would have little or no control over the scope of the testimony to be immunized. To illustrate, if the counsel for the General

Counsel had summoned these witnesses pursuant to an immunity order, he or she would undoubtedly attempt to narrowly limit the interrogation so as not to hinder the criminal prosecutions by producing a wide range of immunized testimony; on the other hand, the respondent Union does not share the government's interest in the prosecution of its own agents and members and its attorney could not be expected to function in the same manner as a public interrogator armed with the immunity order; on the contrary, the Union's counsel might be expected to guide these witnesses through a wide range of immunized testimony which relates to the subject matter of both the Board proceeding and the pending criminal prosecution.

Once a testimonial foundation has been established in the record of the Board proceeding, these witnesses may use the immunity order as a weapon in any subsequent criminal trials to put the government to its "heavy burden" to prove that its evidence is free of taint. Although the defendant's protection is not as broad as under the earlier "transactional" immunity laws, nevertheless, if the state cannot meet this burden, the prosecutions must be dismissed. Kastigar v. United States, supra. In this fashion, the requirements of the new statute which were designed to eliminate the "immunity trap" would be completely undermined.

To interpret the statute to make immunity available

to District 1199 in the present case collides with the legislative design to put tighter reins on the immunity apparatus and to strengthen law enforcement efforts. In fact, the courts have recognized that the danger that the government's efforts to prosecute criminals may be frustrated is inherent where a private party is permitted to control the operative circumstances of an immunity grant. In United States v. Dunham Concrete Products, Inc., 475 F.2d 1241 (5th Cir. 1973), a criminal defendant sought to invoke the immunity provisions of the anti-trust laws based upon depositions he had given as a party defendant in an earlier private anti-trust action. The court found that the immunity statute at issue had been enacted to strengthen the Attorney General's enforcement of the criminal provisions of the anti-trust laws, and it held that to permit a private party to immunize anti-trust violators would be contrary to this legislative intent. In addition the court stated that "the possibility of collusive suits must be reckoned with...The intent of the Act, however, was to ease prosecution, not to complicate it." 475 F.2d at 1246. See also, H. Wagner & Adler Co. v. Mali, 74 F.2d 666 (2d Cir. 1935). Similarly, in the present case, the granting of immunity to District 1199 witnesses could only "complicate" their subsequent prosecutions, and the danger of collusion is particularly great because the witnesses to receive the immunity are "friendly witnesses. It is inconceivable that Congress intended to make

immunity available under these circumstances.

Moreover, although a grant of immunity is to be given only in exchange for the compulsion of potentially incriminating testimony, there is no true compulsion here. In the Board proceeding, District 1199 has been charged with the commission of unlawful acts by its agents and members. By placing the responsibility on the Union to seek an immunity order so as to obtain the testimony of these very individuals, the Board has, in effect, instructed the respondent to call itself to the stand and to use the immunity order to force its own testimony. Through a charade of compulsion, the Union agents and members could voluntarily take the stand to refute the allegations of their unlawful conduct. However, immunity may not be conferred in such a sham situation. In United States v. Wilmington Chemical Corp., 254 F. Supp. 92, 93 (N.D. Ill. 1966), the court noted that:

"[V]oluntary evidence cannot be considered 'compelled testimony' giving rise to immunity. Just as a witness may waive his Fifth Amendment privilege against self-incrimination, Raffel v. United States, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926); Smith v. United States, 337 U.S. 137, 150, 69 S.Ct. 1000, 93 L.Ed. 1264 (1949), so a defendant cannot cry 'compulsion' and seek immunity when he voluntarily offers information. The 'immunity is as broad as the compulsion and no broader.' May v. United States (1949) 84 U.S. App. D.C. 233, 175 F.2d 994, 1001.

See also United States v. Seiffert, 501 F.2d 974 (5th Cir. 1974).

Finally, it must be emphasized that District 1199 required the testimony of its agents and members facing criminal prosecution in order to put on its defense. The General Counsel's assertion in its brief at page 13 that these witnesses cannot be compelled to testify in the absence of a grant of immunity evades the essential point of District 1199's argument: unless immunity is available, the Union is forced to make an unconstitutional choice between potential self-incrimination or a Board sanction; without the immunity order, and hence without the testimony necessary to the defense, due process could not be satisfied unless a continuance were granted. See Point "A", supra. The fact that witnesses may remain silent without the protection of immunity is irrelevant where the testimony is required.

In an effort to demonstrate that District 1199 was not denied an opportunity to present its defense, the Board has assumed and must assume not only that the Organized Crime Control Act makes immunity available to the Union in this case, but also that an immunity order would be granted automatically to the Union upon its request. However, as demonstrated above, the legislative history indicates that Congress did not intend that the Attorney General should approve a grant of immunity pro forma, even where a government agency rather than a private party has initiated the request. However, unless the immunity

is automatically available, the Board cannot purport to remove the unconstitutional choice which it has imposed upon District 1199.

- C. Assuming Arguendo That The Board Properly Construed Section 102.31(c), It Should Have Remanded The Case To The Administrative Law Judge To Afford District 1199 An Opportunity To Appply For An Immunity Order For Its Principal Witnesses, Rather Than Issuing An Order Based Upon The Incomplete Record. The Court Should Deny Enforcement Of The Order Because It Is Based Upon A Proceeding Which Violated Due Process
-

In making her request for the continuance, union counsel indicated that she did not believe that the procedure contained in the Board's rules to obtain the testimony of a witness who has invoked a Fifth Amendment privilege was available to District 1199 as a respondent. [A. 217]. Neither the counsel for the General Counsel nor the Administrative Law Judge took the position that the Union could utilize Section 102.31 to compel the necessary testimony, nor did General Counsel urge this before the Board. It was only after the request for a continuance had been denied and the Union had been deprived of the opportunity to present its principal defense witnesses that the Board, sua sponte, purported to justify the Administrative Law Judge's ruling by holding that the Union could have utilized this provision to apply for an immunity order pursuant to 18 U.S.C. §6001 et seq. Assuming arguendo that the Board has correctly construed Section 102.31(c), nevertheless, it should have remanded the case to the Administrative

Law Judge to offer the Union an opportunity to request immunity for its witnesses and it should have further instructed the Administrative Law Judge to condition his denial of the continuance upon the granting of the immunity orders.

In the present case, the Board construed Section 102.31 (c) for the first time in a reported decision. It is submitted that this rule is not widely utilized in Board proceedings. Indeed, neither the Administrative Law Judge nor the counsel for the General Counsel appeared to be familiar with this provision. In view of this, the Board should not have penalized District 1199 for its failure to invoke this rule, but should have offered the Union an opportunity to avail itself of the appropriate procedure. Such an approach is supported by Board precedent. In cases where the Board has articulated a new substantive policy, it has often 'applied its ruling prospectively only', based upon equitable consideration. Perma Vinyl Corp., 164 NLRB 968; Lilliston Implement Company, 171 NLRB No. 19. See also Rockwell Manufacturing Co. v. NLRB, 330 F.2d 795 (7th Cir. 1964); Ideal Electric and Manufacturing Co., 134 NLRB 1275; National Labor Relations Board v. Beech-Nut Life Savers, Inc., 406 F. 2d 253, (2nd Cir. 1968). Similarly, in the present case as well, fairness required that the Board give prospective effect to its construction of Section 102.31 by giving the Union a chance to apply for immunity and thereby present its defense.

Moreover, in issuing an order based upon a proceeding where District 1199 was not given the opportunity to present its principal defense witnesses, the Board has violated the requirements of due process. In Donnelly Garment Company v. NLRB, 123 F.2d 215, 224 (8 Cir. 1941), the court stated:

That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73, 56 S.Ct. 720, 80 L.Ed. 1033; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 304-305, 57 S.Ct. 724, 81 L.Ed. 1093; *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393, 58 S.Ct. 334, 82 L.Ed. 319; *Morgan v. United States*, 304 U.S. 1, 14, 15, 58 S.Ct. 773, 999, 82 L.Ed. 1129. As Mr. Justice Stone said in his dissenting opinion in *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146, 177, 61 S.Ct. 908, 923, 85 L.Ed. 1251, 'One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion is that it cannot rightly exclude from consideration, facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion. *Interstate Commerce Commission v. Chicago, R. I. & P. Ry. Co.*, 218 U.S. 88, 102, 30 S.Ct. 651, 656, 54 L.Ed. 946; *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77, 78, 56 S.Ct. 720, 736, 737, 80 L.Ed. 1033; *Ohio Bell Telephone Co. v. [Public Utilities Commission]*, 301 U.S. 292, 304, 305, 57 S.Ct. 724, 730, 81 L.Ed. 1093'; and there can be no compromise of this requirement on 'the footing of convenience or expediency, or because of the natural desire to be rid of harassing delay.'

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 305, 57 S.Ct. 724, 731, 81 L. Ed. 1093. . . . [A] controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. See National Labor Relations Board v. Thompson Products, Inc., 6 Cir., 97 F.2d 13, 15; Foote Bros. Gear & Mach. Corp. v. National Labor Relations Board, 7 Cir., 114 F.2d 611, 621.

The Board has often stated that it is the function of the trial judge "to see that facts are clearly and fully developed." Bethlehem Steel Co. v. NLRB, 120 F2d 641, 652 (App. D. C. 1941). See also NLRB v. Baldwin Locomotive Works, 128 F2d 39 (3 Cir. 1942); NLRB v. Bryan Mfg. Co., 196 F.2d 477 (7 Cir. 1952). Section 102.35 of the Board's Rules and Regulations provides in part:

Duties and powers of administrative law judges. - It shall be the duty of the administrative law judge to inquire fully into the facts as to whether the respondent has engaged or is engaging in an unfair labor practice . . .

Where the facts have not been fully developed in a Board proceeding, or where the respondent's right to present its complete defense has been restricted by the trial examiner or administrative law judge, the reviewing courts have repeatedly found such proceedings to be violative of the requirements of due process and have denied enforcement of Board orders based thereupon. Thus, in NLRB v. M. Koppel

Company, 412 F.2d 681 (3 Cir. 1969), the Court noted that:

The restriction on his relevant testimony resulted in what we regard as a record inadequate for the proper determination of whether there had been a proper request and subsequent refusal to bargain under §8(a)(5) of the Act. It is of no moment on such a record that evidence of unfair labor practices may be 'substantial' in itself. 'The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.' Universal Camera Corp. v. Labor Bd., supra, 340 U.S., at 438, 71 S. Ct. at 464. If the Company were permitted to supplement the record, the additional testimony might so detract from the substantiality of the Union's case that we would be required to reach a different result in a later enforcement proceeding. 412 F.2d at 687.

See also Donnelly Garment Co.; Oneonta Dress Co. v. NLRB, 333 F.2d 1 (2 Cir. 1964); Hagopian & Sons, Inc. v. NLRB, 395 F.2d 947 (6 Cir. 1968); See also NLRB v. I. Posner, 342 F.2d 826 (2 Cir. 1962); NLRB v. Ebner Bros. Packers, 364 F.2d 565 (5 Cir. 1966); San-Tul Hotel, 192 NLRB No. 173.

It must be noted as well that the General Counsel has an obligation to insure that the respondent is afforded a fair hearing. In NLRB v. Selwyn Shoe Manufacturing Corporation, 428 F.2d 217, 225 (8 Cir. 1970), the court stated that "[t]he General Counsel has responsibilities beyond that of a mere adversary. As a public official he has a duty and obligation to be fair to all parties and not to knowingly suppress relevant evidence." In Selwyn Shoe, the court refused to enforce a

portion of the Board's order because the General Counsel had suppressed certain relevant evidence. As a result, the court noted, "the integrity of the fact-finding process was thwarted and this stage of the proceeding degenerated into a game rather than a hearing to ascertain facts." 428 F.2d at 225 (Emphasis supplied).

In the present case, a complete "hearing to ascertain facts" has not been held, but has been cut short by the ruling of the Administrative Law Judge denying a continuance, with the approbation of the counsel for the General Counsel. The record contains only the prosecutorial version of the facts. When called upon to review this record, the Board acted as a "Monday-morning quarterback" by informing District 1199 that it could have presented its complete defense, but that "it was too late now." In holding that District 1199 should have applied for an immunity order without giving it an opportunity to make such an application upon remand, the Board has held the Union to a standard which it declines to apply to the Administrative Law Judge or the counsel for the General Counsel, both of whom had a special obligation to see that the record was fully developed.

Bethlehem Steel v. NLRB; Selwyn Shoe Manufacturing.

It must be remembered that the witnesses who have not been heard are not merely corroborative witnesses. They were the principal actors in the strike which was the subject of the

unfair labor practice trial. The union was "on trial" for their conduct. By preventing the Union from presenting what amounts to its basic defense to the unfair labor practice charges, the Board has treated the proceeding as a "game", Selwyn Shoe Mfg. However, fairness dictated that the Union be given the opportunity to present the necessary testimony.

The Board's cavalier treatment of District 1199's due process right to a fair hearing is at odds with sound Board precedent. In Standard Oil Co. of California, 62 NLRB 449, 458 the Board reopened the record of an unfair labor practice trial "in order to remove any question as to the fairness of the proceeding," notwithstanding its rejection of respondent's contention that a motion for a continuance had been improperly denied. And in Indianapolis Glove Company, 88 NLRB 986, 987, while rejecting the contention that the trial examiner had exhibited bias and had violated respondent's right to a fair hearing, the Board nevertheless ordered a rehearing "to avoid even the appearance of a partisan tribunal."

Under all of the circumstances present here, the Board was obligated to remand this case to the Administrative Law Judge. By its failure to take such action and by its issuance of an order based upon an incomplete record, the Board has violated the due process rights of District 1199. The Court should deny enforcement of this order. Donnelly Garment Co.; NLRB v. M. Koppel; Oneonta Dress Co. v. NLRB; Hagopian & Son, Inc. v. NLRB.

II

NO SUBSTANTIAL EVIDENCE HAS BEEN PRESENTED WHICH SUPPORTS THE CONCLUSION OF THE BOARD THAT A DISTRICT 1199 AGENT MADE A THREAT UPON THE LIFE OF AN EMPLOYEE.

- A. The First Amendment Protects Freedom Of Speech On A Picket Line. The Court Should Deny Enforcement Of That Portion Of The Board's Order Which Penalizes The Union For The Exercise Of Free Speech.

It is beyond cavil that picketing, publicizing, and soliciting support for a labor dispute are protected by the First Amendment to the United States Constitution. See Thornhill v. Alabama, 310 U.S. 88 (1939): Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287. (1941). In Milk Wagon Drivers, the Court noted that the guarantee of free speech was to be accorded "a generous scope" and "the right of free speech cannot be denied," notwithstanding "a trivial rough incident or a moment of animal exuberance . . ." 312 U.S. at 296. In Linn v. United Plant Guard Workers, 383 U.S. 53, 58 (1966), the Court recognized that union activities:

. . . are frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language. Cafeteria Employees Union, etc. v. Angelos, 320 U.S. 293, 295.

* * *

. . . [C]ases involving speech are to be considered 'against the background of a profound * * * commitment to the principle that debate * * * should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks.' New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721. 11 L.Ed. 2d 686 (1964) . . . the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless truth. 383 U.S. at 62-63.

The Court has also held that "rhetorical hyperbole" and "imaginative expression of the contempt felt by union members towards those who refuse to join [the strike]." fall within the protection of the First Amendment. Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 286 (1974).

Assuming arguendo that Kevin Doyle did utter the naked words "I'll kill you" to Loren Sherman, such language must be treated as picket line cant which is protected by the First Amendment. Milk Wagon Drivers v. Meadowmoor Dairies. There is not a scintilla of evidence in the record of any attempts to commit personal or property damage. The only evidence is that of rough speech on both sides in the heat of the picket line. It must be remembered that the "victim" Sherman himself admitted that he himself had routinely directed epithets and gestures at Doyle and other pickets. [A. 158-160]. Such "repulsive speech" is likewise protected by the First Amendment. Linn v. United

Plant Guard Workers. Based upon the foregoing, the Court should deny that portion of the Board's order concerning "threatening to kill employees" because it penalizes District 1199 for the mere expression of protected speech. Thornhill v. Alabama; Old Dominion Branch v. Austin.

B. No Substantial Evidence Was
Presented That A Threat To
Kill Was Made.

In finding a bare expression of the words "I'll kill you" to constitute an actual threat upon the life of an employee, the Board has departed from its own standards for evaluating an alleged threat to kill. In Stafford Trucking, Inc., 166 NLRB No. 107, the record established that the Company's president had run toward a picketing employee and with profanity, had shouted "I'll kill you yet." The Administrative Law Judge evaluated all of the circumstances including possible provocative conduct by the employee, and found that these words had been uttered in "a rage" and in "anger". Under these circumstances, the Administrative Law Judge concluded that the statement was not a threat to inflict physical injury upon an employee for engaging in protected activity, and dismissed the allegation of the unlawful conduct. The Board affirmed this decision.

Similarly, in Church Point Wholesale Grocery Co., 215 NLRB No. 93, the employer's General Manager had told a striker that he was "finished" at the same moment that a non-striking employee who accompanied the General Manager was waving a gun at the striker. In holding that this utterance was not violative of the Act, the Board reasoned "the remark . . . appeared to have occurred during a moment of anger and was not based on any preconceived or other unlawful motive." 215 NLRB at 500.

In the above cases, the intention of the declarant and the surrounding circumstances were evaluated in order to determine whether an actual threat to kill had been made. In both cases, the purportedly "threatening" statements were found not to be violative of the Act where they were uttered in anger, without premeditation or without intention to inflict physical injury. Stafford Trucking; Church Point Wholesale Grocery Co.

However, the Board's own standards for evaluating such language were not applied in the present case. The sole evidence offered by the General Counsel that a Union agent had made a threat to kill was the testimony of Loren Sherman that Kevin Doyle had uttered the naked words, "Sherman I'm going to kill you." There is no evidence in the record that Doyle acted with premeditation or with an intent to make an actual threat upon the employee's life or to inflict physical injury. Nor was there even a suggestion that physical injury had been inflicted or attempted.

While the record contains no substantial evidence that an actual threat to kill was made, there is evidence to the contrary. The record indicates that Loren Sherman, the alleged victim of the "threat" routinely made vile and obscene comments and gestures as he crossed the picket line, and he conceded that he called Kevin Doyle such names as

"s--teater." [A 158-160]. It is not difficult to imagine that such provocative conduct would at the very least evoke a crescendo of sterile and ad hominem comments which evidence "animal exuberance" on both sides rather than actual threats of serious harm by a union organizer to a non-striker Cf. Courter & Company, Inc., 198 NLRB No. 29; Yankee Trades, Inc., d/b/a Treadway Inn at Rochester, N. Y., 191 NLRB No. 81; T. C. Worthy Wholesale, Inc., 159 NLRB No. 137.

In concluding that an actual threat to kill had been made, the Administrative Law Judge failed to point to any factors other than the single phrase in evidence which he had evaluated in making his determination. It is submitted that he failed to consider the surrounding circumstances, but rather that he took words uttered in the heat of the picket line and placed a gloss upon them which is not supported by the record. In affirming this conclusion the Board departed from its standards as articulated in Stafford Trucking Inc. and Church Point Wholesale Grocery Co. In another context, the Supreme Court in Watts v. United States, 394 U.S. 705 (1969) was faced with the issue of whether the petitioner's crude and provocative statements constituted an actual threat to kill the President in violation of a federal penal statute. In holding that a threat to kill had not been made, the court stated:

The language of the political arena, like the language used in labor disputes, see Linn

v. United Plant Guard Workers of America,
383 U.S. 53, 58, 86 S. Ct. 657, 15 L.Ed.
2 582 (1966), is often vituperative, abusive,
and inexact. We agree with petitioner that
his only offense here was "a kind of very
crude offensive method of stating a political
opposition to the President." We do not see
how it could be interpreted otherwise.

Cf. U. S. v. Compton, 428 F.2d 18 (2 Cir. 1970).

Likewise, viewed in context and evaluated in light of the Board's own standards, the utterance of Kevin Doyle did not constitute an actual threat upon the life of an employee which was violative of the Act. The court should deny enforcement of that portion of the Board's order requiring the Union to cease and desist from "threatening to kill employees" as this sanction is not supported by substantial evidence in the record.

- C. The Court Should Deny Enforcement Of That Portion Of The Board's Order Which Directs District 1199 To Cease And Desist From "Threatening To Kill Employees" Inasmuch As This Section Is Punitive And Constitutes A Departure From Board Precedent.

In Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938), the Supreme Court construed the authority which Congress had conferred upon the Board to remedy unfair labor practices as being "remedial", and "not punitive" in nature. However, the order in the instant case, insofar as District 1199 is directed to cease and desist from "threatening to kill employees, is punitive and not warranted by the record herein. The records at worst reveals noisy and rowdy picket line activity in the early part of a lengthy strike: a cup of coffee was thrown at the back of a van; someone's heels were stepped on; one employee was prevented from driving across the picket line one day in six months, a paper beverage carton was kicked in the direction of a non-striking employee. It must be emphasized that there was no violence or injury to persons or property by District 1199 during this lengthy strike.

The order of the Board and the notice which it would require the Union to post stating that it "will not threaten to kill employees" imposes a stigma upon the Union which transcends the remedial authority of the Board. This sanction brands the Union as violence-ridden under circumstances where there was no

violence. It neither effectuates the remedial purposes of the Act nor accurately reflects the testimony in this case to order the Union to refrain from making threats to kill. The court should modify the Board's order to delete the punitive provision. Consolidation Edison Co. v. N.L.R.B.

Moreover, the Board has departed from its own precedent in specifically including in its order a prohibition against "threatening to kill employees," rather than merely requiring the Union to refrain from "threatening to cause harm" or "serious" or "bodily" harm to employees. In each of the following cases, the Board made a finding that language similar to the remark attributed to Kevin Doyle had been uttered, but in these cases the Board did not include in its order a specific prohibition against threatening to kill:

Teamsters and Chauffeurs Local Union No. 729,
etc., [Penntruck Co., Inc.], 189 NLRB No. 83;

Local No. 3887, United Steelworkers of America,
[Stephenson Brick & Tile Company], 129 NLRB No. 4;

International Association of Machinists, [General
Electric Company, et al.], 183 NLRB No. 126;

International Brotherhood of Pottery and Allied
Workers, [Homer Laughlin China, Inc.], 217 NLRB
No. 19;

United Steel Workers of America, [Vulcan-Cincinnati]
137 NLRB No. 19.

In the present case, the Board has articulated no reason for its departure from this precedent by the inclusion

in its order of specific prohibition against "threatening to kill employees." Since the Board's decision does not disclose the basis for this action, the court must deny enforcement of that portion of the order. N.L.R.B. v. Metropolitan Life Insurance Company, 380 U.S. 438 (1965).

CONCLUSION

For the above stated reasons, the order of the Board should not be enforced, or, alternatively, the order should be modified to delete the provision of the order which directs District 1199 to cease and desist from "threatening to kill employees".

Respectfully submitted,

SIPSER, WEINSTOCK, HARPER, DORN & LEIBOWITZ
Attorneys for Respondent
380 Madison Avenue
New York, New York 10017

Of Counsel:

Harry Weinstock
Vicki Erenstein

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

XXXXXX
Index No.

Docket No. 77-4419

NATIONAL LABOR RELATIONS BOARD,

Petitioner, ~~XXXXXX~~

against

DISTRICT 1199, NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,
etc.

Respondent. ~~XXXXXX~~

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th Street,
New York, N.Y. 10024.

That on November 4, 19 77 deponent served the annexed

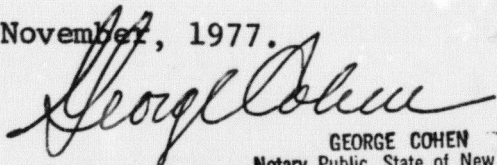
BRIEF FOR RESPONDENT

on Elliott Moore, Deputy Assoc. Genl. Counsel
attorney(s) for Petitioner

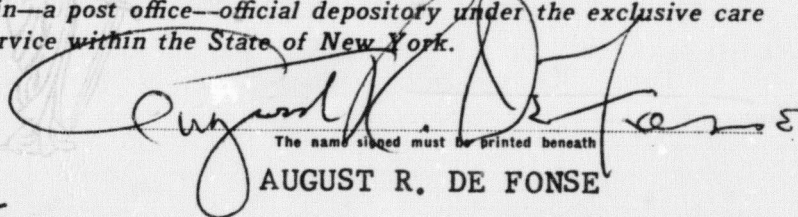
in this action at N.L.R.B., 1717 Pennsylvania Ave., N.W. Washington, D.C. 20570
the address designated by said attorney(s) for that purpose by depositing 2 true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me this 4th day

of November, 1977.



GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1979



The name signed must be printed beneath
AUGUST R. DE FONSE